State of Michigan

In the Supreme Court

Appeal from the Michigan Court of Appeals
Judges: Donofrio, P.J., and Murphy and Kelly, JJ.

People of the State of Michigan,
Plaintiff-Appellant,

vs

Keith Demond Thompson,
Defendant-Appellee,

Supreme Court No. 130825

Court of Appeals No. 258336

Circuit Court No. 04-013556-FH

Brief on Appeal –Appellant

Oral Argument Requested

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Statement of jurisdiction

Pursuant to MCR 7.302, *et seq*., the Genesee County Prosecutor, on behalf of the People, Plaintiff-Appellant, requested Michigan Supreme Court review of the Court of Appeals unpublished opinion in *People v Keith Demond Thompson*, CA 256336 (Feb. 23, 2005), reversing defendant's conviction for keeping or maintaining a drug vehicle contrary to MCL 333.7405(1)(d). [Appendix 9a-12a] On July 19, 2006 leave to appeal was granted. *People v Thompson*, 475 Mich 906 (2006); SC 130825. [Appendix 8a]

Statement of questions for review

Issue I

Whether a defendant must "keep or maintain" a vehicle used for the purpose of selling a controlled substance "continuously for an appreciable period of time" as required by *People v Griffin*, 235 Mich App 27, 32-33 (1999), in order to sustain a conviction under MCL 333.7405(1)(d).

Plaintiff-appellant says: No

Defendant-appellee says: Yes

Issue II

Whether the evidence presented in this case was sufficient to sustain the defendant's conviction for keeping or maintaining a drug vehicle.

Plaintiff-appellant says: Yes

Defendant-appellee says: No

Statement of facts

Detective Lt. Kevin Shanlian testified that on April 9, 2003 he proceeded to Little Caesar's on Pierson Road. Lt. Cherry had developed information that a street person by the name of "Dough" or "Doughboy" would be there selling drugs. [Vol I, 119, Appendix 13a] Four to five officers were there by 7:25 pm. Their concept was to target mid-size dealers, not street dealers. [Vol I, 120-121, Appendix 14a, 15a] Shanlian observed a woman in a red car in the parking lot and she used a pay phone. He observed a white van that "Dough" was supposed to be driving. [Vol I, 126, Appendix 16a] The woman left her car and entered the van in the rear part of the passenger side. [Vol I, 126-127, Appendix 16a, 17a] Shanlian went toward the van. The woman left the van, and got back into her car and started to pull out. Shanlian asked her to get out of the car and when she did so, he saw a man in the back of her car on the floor. Shanlian ordered him to get out. [Vol I, 128, Appendix 18a] In the car he found crack cocaine on the floor of the driver's side. He also found a crack pipe. [Vol I, 130, Appendix 19a] The cocaine was in the corner of a plastic bag, which had been knotted. [Vol I, 132, Appendix 20a] Shanlian checked the inside of defendant Thompson's van. The officers took everyone downtown because they all had outstanding warrants. [Vol I, 135, Appendix 21a] "Doughboy" was identified as defendant Keith Demond Thompson and was placed under arrest. [Vol I, 138, Appendix 22a]

Det. Cheryl Smith testified she searched the car of the woman and found crack cocaine on the floor and a crack pipe in the back. [Vol I, 144, Appendix 23a] Smith said the woman [named Allen] said she had just purchased the cocaine. [Vol I, 150, Appendix 24a]

Diane Watson, a police evidence technician, said that on April 9, 2003 she received a metal pipe used for smoking crack, a ripped plastic bag, a $50 bill, a $100 bill, and seven rent receipts in the names of Regina Mize and defendant Keith Thompson. [Vol II, 188, Appendix

25a] Defendant's objection to admission of the rent receipts was sustained. [Vol II, 192, Appendix 26a]

Lt. Shanlian testified he interviewed the male passenger [Frederick Paige] in the white van. He was acting strange and his speech was slurred. He said he swallowed some cocaine and had trouble breathing and was immediately transported to the hospital. Shanlian said his earlier testimony had been mistaken and that the cocaine found on the floor of the car had not been in a plastic bag but was loose. He did not find drugs in the white van. [Vol II, 222, 230, 231, Appendix 27a, 28a, 29a]

Lt. Terence Green said he was on the surveillance team and that he knew defendant Thompson aka "Doughboy". Defendant drove into the parking lot in a white van. [Vol II, 251, Appendix 30a] Green approached the van on the passenger side and observed a black man on the passenger side throw something plastic on the floor. He arrested the passenger, Frederick Paige. [Vol II, 254, Appendix 33a] No one was in the van other than Paige and defendant Thompson. [Vol II, 252-253, Appendix 31a-33a]

Deputy Jeffrey Antcliff said he was also at the scene. He said that as defendant got out of the van, he had a cell phone in his hand. Before facing him, defendant turned toward the van and the witness could no longer see his hands. [Vol II, 264, Appendix 34a]

Det. Dwayne Cherry testified that he went to the scene at Little Caesar's. A confidential informant had told him earlier that "Dough" or "Doughboy" would deliver narcotics at that location. [Vol II, 267, Appendix 35a] He identified photos of the crack cocaine and crack pipe found in the red auto. In defendant's van he found a $50 bill on or near the console. [Vol II, 277, Appendix 36a] He found a torn sandwich baggie commonly used in packaging drugs. [Vol II, 284-285, 36a, 37a] In his search of defendant he found a

$100 bill in his wallet. He found marijuana on the person in the rear seat of the red car. [Vol II, 287, Appendix 38a] Everyone had outstanding warrants for arrest and they were all taken downtown. [Vol II, 289, Appendix 39a] Cherry took defendant Thompson to the police station where he waived his *Miranda* rights. Defendant Thompson told Cherry a woman entered his van and that she owed him $50 and that she had paid him. [Vol II, 303, Appendix 40a] Cherry told defendant he was lying and defendant said that he had lied. Thompson said she owned him money and that he gave her $20 rock and she gave him $50. The people rested their case.

At trial defendant Thompson testified that on April 9, 2003 he was driving his white van with Frederick Paige as his passenger to get a pizza at Little Caesar's. Angela came up to the passenger side of the van and got in the back. [Vol II, 331, Appendix 41a] She stayed in his van for a time and got out. The police arrived and he was arrested and taken down town. He denied making any statements regarding drugs, $50, or a woman owing him money. [Vol II, 334, Appendix 42a] On the prosecutor's cross-examination he said no $50 bill was in the van. [Vol II, 338, Appendix 43a] He did have $100 bill in his wallet. While Det. Cherry gave him his *Miranda* rights he said he did not make a statement. [Vol II, 343, Appendix 44a] He was asked if it was a coincidence that a confidential informant said he would be at Little Caesar's selling drugs. Defendant testified that he had been called "Doughboy" since he was little. [Vol II, 357, Appendix 45a]

The jury instructions for maintaining a drug vehicle were in accord with CJI2d 12.9 and did not include the *Griffin* requirement that the vehicle be kept and maintained for an appreciable period of time. [Vol III, 426-427, Appendix 46a] Defendant did not object to the instruction as given.

Defendant was jury-convicted of delivery of less than fifty grams of cocaine, MCL 333.7401(2)(a)(iv), and maintaining a drug vehicle, MCL 333.7405(1)(d). Defendant appealed both convictions. The Court of Appeals affirmed defendant's conviction for delivery of cocaine but reversed his conviction for maintaining a drug vehicle. *People v Keith Demond Thompson*, CA 256556 (Feb 23, 2006). [Appendix 9a-12a]

In reversing defendant's conviction the Court of Appeals held:

> "The prosecution did not present evidence that defendant exercised authority or control over the white van for an appreciable period of time for the purpose of making the van available for selling or keeping drugs. The prosecution only presented evidence that defendant used the van for selling or keeping drugs on the night of April 9, 2003. Because defendant's conviction is not supported by sufficient evidence, we reverse defendant's conviction for maintaining a drug vehicle."
>
> [Appendix 10a]

Issue I

Whether a defendant must "keep or maintain" a vehicle used for the purpose of selling a controlled substance "continuously for an appreciable period of time" as required by *People v Griffin*, 235 Mich App 27, 32-33 (1999), in order to sustain a conviction under MCL 333.7405(1)(d).

Plaintiff-Appellant says: No

Defendant-Appellee says: Yes

Standards of Review

In construing the Michigan Public Health Code, the Legislature has declared that this article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states, which enact laws similar to it. See MCL 333.7121, *infra*. Questions of statutory interpretation are questions of law the Supreme Court reviews de novo. *People v Denio*, 454 Mich 691, 698 (1997). In construing a legislative enactment the reviewing court is not at liberty to choose a construction that implements any rational purpose but, rather, must choose the construction which implements the legislative purpose perceived from the language and the context in which it is used. *Frost Pack Co v Grand Rapids*, 399 Mich 664, 683 (1977).

Argument

Various jurisdictions throughout the country have enacted statutes, which, with varying degrees of specificity, criminalize the act of a person permitting real property or motor vehicles to be used for illegal drug activities, such as the manufacturing, sale, keeping, or use. 24 Am Jur 2d Disorderly Houses, Sec. 5. In this regard Michigan enacted MCL 333.7405(1)(d), patterned after the Uniform Controlled Substances Act 1994, 9 ULA section

402, set forth *infra.* Forty- nine other states, Washington D.C., and the Virgin Islands have adopted similar versions.

The language of the statute identifies all the material elements to convey the legislature's intent to criminalize the use of vehicles in illicit drug deals. Therefore, the words of a penal statute must be read in light of the evil sought to be corrected. *Hightower v Det Edison Co*, 262 Mich 1 (1933), and to effect the object of the law. MCL 750.2; *People v McIntosh*, 23 Mich App 412 (1970); *People v Jones*, 12 Mich App 293, 295 (1968). When interpreting statutes, the primary goal of the appellate court is to ascertain and facilitate the Legislature's intent. *People v Stone Transport, Inc.*, 241 Mich App 49, 50 (2000). In making its determination, the court looks at the specific statutory language. *People v Stewart*, 472 Mich 624, 631 (2002); *People v Borchard-Ruhland*, 460 Mich 278, 284 (1999). Where the language of the statute is clear, judicial construction is neither necessary nor permitted and the statute must be enforced as written. *Id.* But where reasonable minds can differ as to the meaning of the statute, judicial construction is appropriate. *People v Warren,* 462 Mich 415, 427 (2000). In such cases, the courts must consider the object of the statute, the harm it is designed to remedy, and apply a reasonable construction that best accomplishes its purpose. *People v Adair,* 452 Mich 473, 479-480 (1996). It is also noteworthy that the Legislature is presumed to be familiar with the rules of statutory construction and to act with knowledge of the appellate court's statutory interpretation. *People v Higuera*, 244 Mich App 429, 436 (2001); *People v Ramsdell*, 230 Mich App 386, 392 (1998).

If the terms of a statute provide no definitive answer, the court may resort to extrinsic sources, including the ostensible object to be achieved and the legislative history. The court must select the construction that comports most closely with the apparent intent of the

legislature, with a view to promoting rather than defeating the general purpose of the statute, and to avoid an interpretation that would lead to absurd consequences. *People v Brooks*, 33 Mich App 297 (1971); *People v Coronado*, 12 Cal 4th 145, 151 (1995). The rules of construction are subordinate to the primary rule that a statute must be interpreted consistent with legislative intent. *Estate of Banerjee*, 21 Cal 3d 527, 539 (1978); *Frost Pack Co v Grand Rapids*, *supra* at 683.

MCL 333.7121, **Construction and application of article** provides:

> (1) This article applies to violations of law, seizures and forfeitures, injunctive proceedings, administrative proceedings, investigations which occur after its effective date.
>
> (2) This article shall be applied and construed to effectuate its general purpose to make uniform the law with respect to the subject of this article among those states which enact laws similar to it.

The statute at issue in this case, MCL 333.7405(d), provides that a person:

> shall not knowingly keep or maintain a ...vehicle... that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

The Court of Appeals in this case affirmed defendant Thompson's conviction for delivery of less than fifty grams of cocaine, contrary to MCL 333.7401(2)(a)(iv). The Court summarized the evidence warranting the conviction as follows:

> ... [T]here was testimony by a police officer that defendant admitted giving rock, crack cocaine to a female who had arrived at the parking lot in a separate vehicle and that the female had given defendant $50 that was owed to him. While defendant testified that he had not provided drugs to anyone, there was evidence that the female purchaser walked over to the van driven by defendant and entered the vehicle, that she then left the van and reentered her vehicle via the driver's side door of her car, that four rocks of cocaine were found on the driver's side floor board of her vehicle, that there was a $50 bill in the van, that an empty baggie was found in the van which appeared to have been twisted in a manner typical of drug packaging, that defendant, upon making eye contact with an officer,

> ducked back into the driver's side of the van, and that defendant's passenger swallowed some cocaine. This evidence, when considered with the surrounding circumstances, provides strong corroboration of the confession given by defendant to police as it was consistent with his statement. ...
>
> [Appendix 11a]

The Court found that while this evidence was sufficient to warrant defendant's conviction for delivery of less than fifty grams of cocaine, it was not sufficient to support his conviction for maintaining a drug vehicle. [Appendix 10a]

24 ALR 5th 428 states that in construing and applying state statutes criminalizing the act of permitting real property or vehicles to be used for illegal drug activity, courts have focused attention on the nature and extent of the illegal drug activity (sections 6-8), the defendant's knowledge of the illegal drug activity (sections 9-10), the place of the illegal drug activity (sections 11-14), and other such matters.

Specific state statutes criminalizing the act of permitting real property or vehicles to be used for illegal drug activity vary in their wording and specificity. Whether the statutes speak in terms of maintaining a place for illegal drug activity in terms of a common nuisance specific to illegal drug activities, or simply speak in terms of knowingly permitting illegal drug activities, these statutes nonetheless are "criminal," with the requirement that the prosecution prove each of the essential elements of the crime beyond a reasonable doubt.

Relying on *People v Griffin*, 235 Mich App 27 (1999) defendant Thompson urged that evidence of a single instance of a drug sale, without circumstances supporting a reasonable inference that his van was used for the prohibited purpose continuously or repetitively, did not suffice to sustain a conviction for maintaining a drug vehicle. The Court of Appeals agreed with defendant and also relied on *People v Griffin*, 235 Mich App 27, 32 (1999) to reverse his conviction:

> The prosecution did not present evidence that defendant exercised authority or control over the white van for an appreciable period of time for the purposes of making the van available for selling or keeping drugs. *The prosecution only presented evidence that defendant used the van for selling or keeping drugs on the night of April 9, 2003.* Because defendant's conviction is not supported by sufficient evidence, we reverse... [Emphasis added] [Appendix 10a]

The title of the Controlled Substances Act (former section 335.301 *et seq.*; see now MCL 333.7401 *et seq.*) sets out the legislative intent to control all trafficking in drugs. *People v Rodriquez*, 61 Mich App 42, 45 (1975).

Decisions construing the terms "maintaining" or "opening" in reference to narcotics cases rely on earlier opinions which construed those terms in statutes proscribing maintaining alcohol-related nuisances during Prohibition. These were places whose proprietors meant them to be used for consumption or sale of alcohol. Similarly, some state courts have held that their Health and Safety Code sections dealing with illicit drugs are aimed at places intended for a continuing course of use or distribution. See *People v Shoals*, 10 Cal Rptr 2d 296 (1992).

There is a split of authority regarding what constitutes a violation of the Uniform Act. In some states adopting statutes modeled after the Uniform Act, Courts have held that more than a single isolated instance of drug activity is required to support a conviction. For example, in *Barnes v State*, 339 SE2d 229 (Ga, 1986), the Georgia Supreme Court held that to support a conviction under Ga Code Ann §16-13-41(a)(5) for maintaining a residence used for keeping or selling controlled substances, the evidence must be sufficient to support a finding of "something more" than an isolated single instance of the proscribed drug activity. The Court also held that, in determining the sufficiency of the evidence in this regard, each case must be judged according to its own unique facts and circumstances, emphasizing that

there was no inflexible rule that evidence found only upon one single occasion could not be sufficient to show the crime of a continuing nature. To the same effect, the Maryland Court of Appeals in *Hunt v State*, 314 A2d 743 (Md App, 1974) held that the requirement of Maryland's criminal common nuisance statute specific to illegal drug activities, [Md. Code art. 27, § 286(a)(5) (1957)] was that the drug activity be of a "continuing and recurring character." Noting that this requirement did not preclude evidence found on only a single occasion from being sufficient to show this crime of a "continuing nature," the court concluded that each case must be judged according to its own circumstances as to whether the illegal drug activities were of a "continuing or habitual" character.

In *Riding v State*, 527 NE2d 185 (Ind App, 1988) the Indiana Court of Appeals held that there was sufficient evidence that defendant's room within a building was a common nuisance under Indiana Code sec 35-48-4-13(b), which made it a crime to maintain a place for the keeping or sale of drugs, where more than 800 grams of marijuana and a scale were both found in defendant's room. The Court concluded that evidence of a "large quantity of marijuana and the presence of a scale employed in the weighing of marijuana" permitted the inference of the defendant's common nuisance for the selling of marijuana.

In *State v Jones*, 388 NE2d 213 (NC App, 1990), the North Carolina Court of Appeals held that evidence in support of charges of trafficking, possession with intent to sell and deliver, and drug manufacturing also supported the charge of "maintaining" a dwelling for the purpose of keeping or selling a controlled substance, when it was combined with the defendant's admission that she maintained the premises and was the only resident of the apartment where the drugs were found. See also *People v Holland*, 158 Cal App 2d 583; 322

P2d 983, 986 (1958) (holding there must be "some purpose in the use of the place for the proscribed illegal conduct").

In North Carolina, the determination of whether a building or other place issued for keeping or selling a controlled substance "will depend on the totality of the circumstances." *State v Mitchell*, 336 NC 22; 442 SE2d 24, 30 (1994). Factors to be considered in determining whether a particular place is used to "keep or sell" controlled substances include: a large amount of cash being found in the place; a defendant admitting to selling controlled substances; and the place containing numerous items of drug paraphernalia See *id.*, see also *State v Bright*, 78 NC App 239; 337 SE2d 87-88 (1985) *disc. review denied*, 341 SE2d 31 (1986); *State v Frazier*, 142 NC App 361; 542 SE2d 682 (2001).

While the above-referenced decisions may support the conclusion that the keeping or maintaining element of the Michigan drug house statute contemplates a continuing pattern of criminal behavior, beyond an isolated incident of possession or sale at a house, it does not necessarily follow that they control the situation, as in the case at hand where a motor vehicle is involved.

There is nothing in a plain reading of MCL 333.7405(1)(d) to suggest the Legislature intended to incorporate an "appreciable period of time" as an element of proof for a conviction. The Court of Appeals' requirement that the prosecution show that the drug activity continued for an "appreciable period of time" before they can convict for violation of MCL 333.7405(1)(d) is an impermissible construction. MCL 333.7405(1)(d) identifies all the material elements necessary to convey the Legislature's intent. That is, it states various ways in which the crime is committed, but nowhere does it state that the activity must be carried on for an "appreciable period of time." Even the United States Supreme Court

ordinarily resists reading words or elements into a statute that do not appear on its face. *Bates v United States*, 522 US 23 (1997). See also *Elezovic v Ford Motor Co*, 472 Mich 408 (2005).

Accordingly, this Court should overrule the Court of Appeals ruling in *Griffin* that the intent of MCL 333.7405(1)(d) is criminalize the conduct of only those individuals who are shown to have been committing the proscribed acts for an appreciable period of time.

In *People v Bartlett*, 231 Mich App 139 (1998), the Court of Appeals found that the defendant, who rented a room in which police officers located drug paraphernalia and a sawed-off shotgun during a raid, had some control over the first floor of the residence, where his bedroom was located for purposes of MCL 333.7405(1)(d) was properly convicted of maintaining a drug house. The Court held that an offense committed contrary to MCL 333.7405(1)(d) is established with evidence:

> (A) That the defendant kept or maintained a dwelling or building; (B) that the building kept or maintained by the defendant was used for keeping, selling or using controlled substances; (C) that the defendant knew that the building was used for keeping or selling controlled substances; and (D) that the defendant had some general control over the dwelling or building. *Bartlett, supra,* at 152.

Bartlett does not require proof that the prohibited conduct under MCL 333.7405(1)(d) occur for a particular period of time and is consistent with the statutory language.

Michigan Jury Instruction, CJI 2d 12.9, follows the *Bartlett* decision and does not require a time span to warrant a conviction. The Instruction was adopted by the Jury Instructions Committee in October, 2002 to reflect the elements of MCL 333.7405(d).

> (1) The defendant is charged with the crime commonly known as knowingly maintaining or keeping a drug house. To prove this charge the prosecutor must prove each of the following elements beyond a reasonable doubt:

(2) First, that the defendant knowingly kept or maintained a [building/ dwelling/vehicle/vessel/ (describe other place)].

[Select (a),(b), and/or (c) as appropriate.]

(a) frequented by persons for the purpose of illegally using controlled substances.
(b) Used for illegally keeping controlled substances.
(c) Used for illegally selling controlled substances.

(3) Third, that the defendant knew that the [building/dwelling/vehicle/ vessel/ (describe other place)] was frequented or sued for such illegal purposes.

Here the Court of Appeals reversed defendant Thompson's maintaining a drug vehicle conviction relying on *People v Griffin*, 235 Mich App 27 (1999) where the court examined MCL 333.7405(1)(d) and held, "that to 'keep or maintain' a drug house, it is not necessary to own or reside at one, but simply to exercise authority or control over the property for purposes of making it available to keeping or selling proscribed drugs and to do so continuously for an appreciable period." *Id.* at 32. The Court in *Griffin* said that its reading of our statute comports with other jurisdictions' construction of the terms "keep or maintain" as used in similar statutes. 235 Mich App at 33, n 2. However, the cases referenced in *Griffin* do not support its holding that a conviction for keeping or maintaining a drug vehicle cannot stand in the absence of proof that the vehicle be maintained for **"an appreciable period of time."** For example, in *State v Fernandez*, 89 Wash App 292, 301; 948 P2d 872 (1997), the defendant appealed a conviction for an offense equivalent to MCL 333.7405(1)(d). The Washington Court of Appeals held that "the term 'maintain' contemplates some degree of control over the premises and making it available for illegal use." *Fernandez* cites *United States v Clavis*, 956 F2d 1079, 1090 (CA 11, 1992) where the Court of Appeals for the 11th Circuit examined the federal version of maintaining a drug

house, USC § 856(a)(1), and held that the elements are that the defendant (1) knowingly, (2) operated or maintained a place, (3) for the purpose of manufacturing, distributing or using any controlled substance.

In *Dawson v State*, 894 P2d 672 (Alas App, 1995) the Alaska Court of Appeals held that the Alaska statute for maintaining a drug house required proof of continuity and precluded conviction for an isolated incident. However, the Court further found that the element of continuity was a question of fact based on the totality of the circumstances. The court said: "there is no inflexible rule that evidence found only on a single occasion cannot be sufficient to show a crime of a continuing nature." *Id.* at 675-676.

In *Meeks v State*, 872 P2d 936, 938 (Okla, 1994) the court held that under Oklahoma's statute the offense of maintaining a drug house is proved with evidence that: "(1) substantial purpose is for the keeping, selling or using of drugs; and, (2) there must be shown more than a single, isolated incidence of the activity. In addition each case must be judged on its own facts." However, the language of the court clearly shows that the question of continuity is a question of fact for the jury.

Griffin also cites *State v Allen*, 102 NC App 598; 403 SE2d 907 (1991), rev'd on other grounds, 418 SE2d 225 (1992). In *Allen*, the defendant appealed a misdemeanor conviction of maintaining a drug house under North Carolina law. The court held that the elements are "(1) knowingly keeping or maintaining (2) a building, vehicle or other place (3) being resorted to by persons unlawfully using controlled substances, or being used for unlawfully keeping or selling controlled substances." *Id.* However, the Court did not require the prosecutor to present evidence related to time.

Griffin cites *Barnes v State*, 255 Ga 396; 339 SE2d 229 (1986) where the court held that while "the evidence must be sufficient to support a finding of something more than a single, isolated instance of the proscribed activity ... each case must be adjudged according to its own unique facts and circumstances, and there is no inflexible rule that evidence found only on a single occasion cannot be sufficient to show a crime of a continuing nature."

The People urge that this Honorable Court will follow the holding in *Bartlett.* Michigan Court Rule 7.215(1) provides that:

> A panel of the Court of Appeals must follow the rule of law established by a prior published decision of the Court of Appeals issued on or after November 1, 1990, that has not been reversed or modified by the Supreme Court, as provided in this rule.

The Court of Appeals in this case was actually bound by the 1998 *Bartlett* decision because it was issued prior to the 1999 decision entered in *Griffin*. Under *Bartlett,* as argued above, a plain reading of MCL 333.7405(1)(d), does not require that the prosecutor present evidence defendant used the vehicle for illegal drug activity "continuously for an appreciable period of time."

This Honorable Court has not had occasion to interpret MCL 333.7505(1)(d) and our Public Health Code is taken almost verbatim from the Uniform Controlled Substances Act of 1970. The purpose of the Uniform Act was to obtain uniformity between the laws of the states and those of the federal government with respect to controlled substances. See 9 ULA 188 and MCL 333.7121. While the interpretation placed on 9 ULA 492 is not binding on this Court, a review of the decisions from other states is instructive in light of the legislature's goal of achieving uniformity with states adopting the act. See e.g., *Cassady v Wheeler*, 224 NW2d 649 (Iowa, 1974) (noting that "[j]udicial interpretations in other

jurisdictions of [the uniform act] are entitled to great weight, although neither conclusive nor compulsory").

The people respectfully submit that the Court of Appeals decision in this case and the decision in *Griffin* are too restrictive in their reading of the above-referenced cases. It is true that federal cases such as *United States v Clavis*, 956 F2d 1079. 1094 (11th Cir. 1992) embrace some degree of continuity. It is also true that, the state court crack-house decisions have uniformly adopted the position that the prosecution is required to prove and the jury to find, something more than a single, isolated instance of the proscribed activity. *Barnes v State*, 339 SE2d 229, 234 (Ga, 1986). On the other hand these same courts recognized that "'there is no inflexible rule that evidence found only on a single occasion cannot be sufficient to show a crime of a continuing nature." *Barnes* at 234.

The people further submit that the Court of Appeals decision in this case and in *Griffin* are contrary to the better-reasoned decisions of the Delaware Supreme Court. For example, in reversing the defendant's conviction the Court in *Priest v State*, 879 A2d 575 (Del, 2005), held that "to sustain a finding of guilt on a Maintaining a Vehicle charge, the State must offer evidence of some affirmative activity by the defendant to utilize the vehicle to facilitate the possession, delivery, or use of controlled substances." Because the record contained no evidence that *Priest* engaged in any of these activities, his conviction was vacated. The Court cites *Lonergan v State*, 590 A2d 502 (Del, 1991) where the defendant challenged his Maintaining a Drug Vehicle conviction. *Lonergan* argued "a single incident of transporting drugs in a vehicle is insufficient to satisfy the statutory requirement of maintaining, and that the State must establish a continuing illicit operation before liability will attach." The court rejected the argument and held:

> [I]t is our belief that the language of this section should be interpreted broadly to include a single incident. The obvious purpose of the statute is to discourage the use of motor vehicles in the transportation of drugs. That purpose is not served by exempting individual violations.

Based on the "obvious purpose of the statute," the Court held that a single incident of transporting drugs in a vehicle, without any additional evidence tending to establish an ongoing pattern, can suffice to support a maintaining charge.

In *McNulty v State*, 655 A2d 1214 (Del, 1995) the court overturned a Maintaining a Vehicle conviction on grounds of insufficiency of evidence. On appeal the prosecution argued that because *McNulty's* presence was critical to the drug deal's success, the jury properly convicted him as an accomplice. The Court reversed finding that "evidence relating to *McNulty's* exclusive ability to identify the buyer has no relevance to defendant's having facilitated the commission of the offense" of knowingly maintaining a vehicle for drug dealing. Although the Court implicitly assumed the *Lonergan* "single incident" definition, the Court found that the fact that *McNulty* personally knew a party to the transaction, without more and whatever might be its effect on accomplice liability for a drug possession offense, could not "facilitate" the other party's knowing maintenance of a vehicle for drug dealing.

In *Watson v State*, 755 A2d 390 (Del, 2000) the Delaware Court decided another sufficiency of the evidence claim. Defendant Watson was a passenger in an auto and argued that because the driver admitted ownership of the drugs, he (Watson) could not be convicted of maintaining a vehicle. After stating that "[p]roof of a single incident of transporting drugs in a vehicle meets the statutory requirement" the Court held that proof of constructive possession is sufficient to warrant a conviction for Maintaining a Vehicle. In the companion case of *Fletcher v State*, 870 A2d 1191 (Del, 2005) the Court upheld a maintaining conviction. Distinguishing the *McNulty* case, *supra,* the Court found that both Fletcher's

control of the drugs and the conduct of the driver constituted "significant evidence of [Fletcher's] direct involvement" in maintaining the vehicle for keeping a controlled substance. The Court explains that starting with *Lonergan*, each of the referenced cases, reaffirmed the principle that Section 4755 requires only that the State prove a single instance of possession or use of a controlled substance in connection with a vehicle. In those cases the critical bench mark for determining the sufficiency of evidence in a Maintaining a Vehicle prosecution has been the degree of the defendant's control in connection with the possession of drugs. See also *State v Wheeler*, 2006 WL 337047 (Unpublished); *Thomas v State*, 886 A2d 1278 (Del, 2005) (Unpublished); *Hopkins v State*, 893 A2d 922 (Del, 2006); *State v Rhinehardt*, 1990 WL 9509 (Del Super) (Unpublished).

It is true that several of the reported decisions from other UCSA jurisdictions, [9 ULA Sec. 402] referenced *supra*, including the Michigan Court of Appeals in *People v Griffin*, 235 Mich App 27 (1999) reject the "single occurrence" approach of Delaware. The people submit however, that the "single occurrence" rationale represents a more realistic perspective of the illicit drug culture and its method of doing business and is consistent with Michigan's endeavor to stop drug trafficking.

The people submit that this Court should be persuaded to adopt the Delaware general rule that "**the critical benchmark for determining the sufficiency of the evidence in a Maintaining a Vehicle prosecution has been the degree of the defendant's control or use of the vehicle in connection with the possession of drugs**." The Court explains that **"the crucial inquiry [was] whether [the defendant] knew that he was using the car to facilitate ... [the] attempted drug deal."** Thus the court held that to "sustain a finding of guilt on a maintaining a vehicle charge the state must offer some affirmative activity by the

defendant to utilize the vehicle to facilitate the possession, delivery or use of controlled substances."

The people submit that under the "single occurrence" approach, the prosecutor presented more than ample evidence of affirmative activity by defendant Thompson to utilize his van to facilitate the possession, delivery, or use of controlled substances. [See Appendix 11a, Appellant's brief, *supra*, p 7]

The Court of Appeals rejected the prosecutor's request to reconsider the holding in *Griffin*. The Court was satisfied that the *Griffin* panel had properly employed general principles of statutory construction and "merely noted" at the end of its analysis that the Court's conclusion was consistent with other jurisdictions' interpretations to Keep and maintain" as used in the context of similar drug laws. [Appendix 10a]

Since the Court of Appeals in this case rejected the prosecutor's request to overrule *Griffin,* the people respectfully request that this Honorable Court do so, and instead adopt the single occurrence approach of the state of Delaware and order reinstatement of defendant's conviction for maintaining a drug vehicle.

It is decisions such as *People v Griffin*, 235 Mich App 27 (1999) that bestirs the public to ridicule the courts. *Delaware v Van Arsdall*, 475 US 673 (1986). The people respectfully submit that if the purpose of adopting statutes based on the UCSA, [9 ULA Sec 402] is to further the "nationwide" effort to achieve uniformity between the drug laws of the various states and federal legislation and by so doing seek to combat the ills of drug abuse more effectively, MCL 333.7121, *Priest v State*, 879 A2d 575 (2005); *People v Rodriguez*, 61 Mich App 42 (1975) decisions such as *People v Griffin*, *supra*, do not serve that purpose.

Issue II

Whether the evidence presented in this case was sufficient to sustain the defendant's conviction for keeping or maintaining a drug vehicle.

Plaintiff-Appellant says: Yes

Defendant-Appellee says: No

Standard of Review

Defendant's challenge to the sufficiency of the evidence is reviewed *de novo* in a light most favorable to the prosecution to determine whether there was sufficient evidence to justify a rational trier of fact in finding guilt beyond a reasonable doubt. *People v Wolfe*, 440 Mich 508, 513 (1992); *People v Hardiman*, 466 Mich 417 (2002).

Argument

In determining the sufficiency of the evidence on appeal in a criminal case, the issue before the court on review is whether there is evidence in the record, which, if believed by the jury is sufficient to sustain a finding of guilt beyond a reasonable doubt. In making that determination the court must accept the evidence and the most favorable inferences fairly drawn there from, which will support the verdict. Moreover, the jury is the exclusive judge of the credibility of the witnesses and the weight of the evidence. Therefore, the Court does not resolve conflicts in the evidence, or pass on the credibility of witnesses or weigh the evidence. Moreover, no guilty verdict will be set aside if the evidence, including circumstantial evidence and reasonable inferences drawn therefrom, sustains a reasonable theory of guilt. S*tate v LaPlante*, 650 NW2d 305 (SD 2002) and citations; *People v Johnson*, 26 Cal 3d 557,578 (1980); *State v Poellinger*, 451 NW2d 752 (Wis. 1990); *Jackson v Virginia*, 443 US 307 (1997).

MCL 333.7405(d)(1) provides that a person:

> shall not knowingly keep or maintain a ...vehicle... that is frequented by persons using controlled substances in violation of this article for the purpose of using controlled substances, or that is used for keeping or selling controlled substances in violation of this article.

The Court of Appeals affirmed defendant's conviction for delivery of less than fifty grams of cocaine contrary to MCL 333.7401)(2)(a)(iv), but reversed his conviction for maintaining a drug vehicle in violation of MCL 333.7405(1)(d). [Appendix 10a] In affirming the PWID conviction the Court of Appeals found:

> There was testimony by a police officer that defendant admitted giving rock, crack cocaine to a female who had arrived at the parking lot in a separate vehicle and that the female had given defendant $50 that was owed to him. While defendant testified that he had not provided drugs to anyone, there was evidence that the female purchaser walked over to the van driven by defendant and entered the vehicle, that she then left the van and reentered her vehicle via the driver's side door of her car, that four rocks of cocaine were found on the driver's side floor board of her vehicle, that there was a $50 bill in the van, that an empty baggie was found in the van which appeared to have been twisted in a manner typical of drug packaging, that defendant, upon making eye contact with an officer, ducked back into the driver's side of the van, and that defendant's passenger swallowed some cocaine. This evidence, when considered with the surrounding circumstances, provides strong corroboration of the confession given by defendant to police as it was consistent with his statement. We are confident that the jury's verdict ... etc... [Appendix 11a]

Relying on *People v Griffin*, 235 Mich App 27 (1999) defendant Thompson argued that evidence of a single instance of a drug sale, without circumstances supporting a reasonable inference that defendant's van was used for the prohibited purposes continuously or repetitively, does not suffice to sustain a conviction of maintaining a drug vehicle. The Court of Appeals agreed with defendant and held:

> The prosecution did not present evidence that defendant exercised authority or control over the white van for an appreciable period of time for the purposes of making the van available for selling or keeping drugs. *The prosecution only presented evidence that defendant used the van for selling or keeping drugs on the night of April 9, 2003.* Because

> defendant's conviction is not supported by sufficient evidence, we reverse ... [Emphasis added]
> [Appendix 10a]

If this Court overrules *Griffin*, under the plain language of MCL 333.7405(1)(d) and consistent with *Bartlett*, *supra*, the evidence presented at trial supported defendant's conviction for maintaining a drug vehicle. However, *arguendo*, the evidence was sufficient even under *Griffin*. The Court of Appeals erred in reversing defendant's conviction because it failed to consider the evidence in a light most favorable to the prosecution.

The Court of Appeals decision fails to take into account the realities of the illicit drug culture. Additionally, the Court of Appeals fails to actually apply the correct review standard.

In order to overcome the presumption of innocence accorded an accused in a criminal trial, the prosecution bears the burden of proving each essential element of the crime charged beyond a reasonable doubt. *In re Winship*, 397 US 358, 364 (1970). The critical inquiry on review of the sufficiency of the evidence to support a conviction is "whether the record evidence could reasonably support a finding of guilt beyond a reasonable doubt." *Jackson v Virginia*, 443 US 307, 318 (1979).

> [T]his inquiry does not require a court to "ask itself whether *it* believes that the evidence at trial established guilt beyond a reasonable doubt" Instead, the relevant question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements beyond a reasonable doubt. *Id.* at 318-19 (internal citation and footnote omitted). This "standard must be applied with explicit reference to the substantive elements of the criminal offense as defined by state law. *Id.* at 324 n. 16.

The appellate standard of review of the sufficiency of the evidence to support a conviction is the same whether the evidence presented at trial is direct or circumstantial. *State v Marshall*, 284 NW2d 592 (Wis, 1979).

The Wisconsin Supreme Court in *State v Poellinger*, 451 NW2d 752 (Wis, 1990) explains that under the reasonable doubt standard of review, the prosecution has the burden of proving every essential element of the crime charged beyond a reasonable doubt. The test is not whether the reviewing court or any members thereof are convinced of the defendant's guilt beyond a reasonable doubt, but whether the reviewing court " ... can conclude the trier of facts could, acting reasonably, be so convinced by the evidence it had a right to believe and accept as true ..." The Court further explained:

> The credibility of the witnesses and the weight of the evidence are for the trier of fact. In reviewing the evidence to challenge a finding of fact, we view the evidence in the light most favorable to the finding. *Reasonable inferences drawn from the evidence can support a finding of fact, and, if more than one reasonable inference can be drawn from the evidence, the inference which supports the finding is the one that must be adopted ...*' [emphasis added]

Stated another way, the appellate court must also accept any reasonable inference that the jury may have drawn from the facts. *Id.* Where a convicted defendant asserts there is insufficient evidence to support the judgment, the court's review is circumscribed. The court must review the whole record most favorably to the judgment to determine whether there is substantial evidence. That is, evidence that is reasonable, credible, and of solid value—from which a reasonable trier of fact could have made the requisite finding under the governing standard of proof. *In re Jerry M.*, 59 Cal App 4th 289, 298 (1997). Stated another way, when reviewing the sufficiency of the evidence to support a conviction, the court must view the

evidence most favorably to the State and reverse only if the direct and circumstantial evidence is so insufficient in probative value that no reasonable trier of fact could have found guilt beyond a reasonable doubt. See again *State v Poellinger*, *supra*.

The case at bar is not lacking in circumstances supporting a reasonable inference that defendant's van was used for the prohibited purpose of being "used for keeping or selling controlled substances in violation of this article." The police had prior knowledge that defendant was a drug dealer and were informed that on the evening of April 9, 2003 he would be delivering drugs from his white van at the Little Caesar's parking lot in the City of Flint located at 2214 W. Pierson Road. Sure enough, as informed, defendant showed up at Little Caesar's in his van and admittedly sold a rock of cocaine to a woman [Angela Allen] for $50. Defendant admitted on cross-examination by the prosecutor that he was the owner of the white van and that he was driving it to Little Caesar's on the night in question. The money and the crack cocaine were seized from defendant and Ms. Allen before they could leave the parking lot and they were arrested. Also prior to the instant delivery by defendant to Allen, defendant's passenger, Frederick Paige, had ingested cocaine while sitting in defendant's van. [See again Appendix 11a, 27a] In a light most favorable to the prosecution, this evidence supports a reasonable inference that defendant Thompson maintained his vehicle to harbor drug activity for an appreciable period of time under *Griffin*. Accordingly the conviction for maintaining a drug vehicle should be reinstated by this Honorable Court.

In the alternative the people submit that defendant's conviction for violation of MCL 333.7405(1)(d) should be reinstated as argued under Issue I, *supra*, on this Court's adoption of the Delaware single occurrence approach.

Relief

Wherefore, the People pray that this Honorable Court will and reverse the Court of Appeals below and reinstate defendant's conviction for Maintaining a Drug Vehicle contrary to MCL 333.7405(1)(d).

Date: September 12, 2006

Respectfully submitted,

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